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No. 87-1919

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1987

YUKON ENERGY CORPORATION,
Petitioner,

vs.

WILLIAM F. HAGERMAN,
Respondent.

On Petition for a Writ of Certiorari
to the United States Supreme Court
From the Eighth Circuit Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is entry of summary judgment in favor of the respondent proper to secure the just, speedy, and inexpensive determination of an action when the respondent has proved that petitioner's pleadings and affidavits have not raised a genuine issue of material fact and that respondent is entitled to judgment as a matter of law?

PARTIES TO THE PROCEEDING

Petitioner:

Yukon Energy Corporation

Respondent:

William F. Hagerman

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BRIEF IN OPPOSITION

Respondent William Hagerman prays that the Supreme Court of the United States deny petitioner's request for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered and filed in this action on February 9, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit affirming the order of the District Court is reported

at 839 F.2d 407 and is reprinted in Appendix A to the Petition for a Writ of Certiorari. The order of the United States District Court for the District of Minnesota is contained in Civ. No. 4-85-960 (Dist. Minn. October 21, 1986) and is reprinted in Appendix B to the Petition for a Writ of Certiorari.

STATEMENT OF JURISDICTION

Respondent agrees with the petitioner's Statement of Jurisdiction.

RULE INVOLVED

This case involves the application of Rule 56 of the Federal Rules of Civil Procedure. The rule provides in pertinent part:

> (c) The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
>
> . . .
>
> (e) When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

STATEMENT OF THE CASE

The district court entered summary judgment in favor of William Hagerman against Yukon Energy Corporation. The essential allegations of the Complaint were admitted in public documents submitted to the United States Securities and Exchange Commission and the Minnesota Department of Commerce pursuant to a public offering of stock by Yukon Energy Corporation.

The District Court held that the petitioner failed to demonstrate the existence of a genuine issue of material fact which would preclude summary judgment and that Hagerman demonstrated he was entitled to judgment as a matter of law. On appeal by the petitioner, the Eighth Circuit Court of Appeals reexamined the evidence presented to the district court and also concluded that the petitioner failed to raise a genuine issue of material fact. Petitioner now asks the Supreme Court of the United States to make yet another evaluation of the evidence in this case by way of Petition for Certiorari.

A. Factual Basis For Summary Judgment.

Yukon Energy Corporation manufactures furnaces for residential and commercial use. In 1983, petitioner purchased certain technology to develop fuel efficient furnaces. Yukon and Hagerman subsequently negotiated an agreement to fund the development of that technology. Pursuant to the agreement, drafted by Yukon's attorney, Hagerman purchased the technology from Yukon Energy Corporation for $150,000 and licensed the technology back to Yukon. The technology agreement required Yukon to pay royalties to Hagerman annually, subject to minimum and maximum

payments. Yukon was given the option to repurchase the technology from Hagerman within ten years for $175,000. In the event of a public offering of Yukon stock within ten years of the agreement, Hagerman was given the option to purchase Yukon stock at book value in an amount equal to five percent of the shares owned by Yukon's president, David Tjosvold.

On October 23, 1984, Yukon exercised its option to repurchase the technology from Hagerman. Yukon delivered to Hagerman a check for the repurchase price of $175,000. In addition, Yukon delivered to Hagerman a check for $18,000 as the first year's royalties. On the same day, Hagerman gave Yukon written notice of his intent to exercise his stock option in the event of a public offering of Yukon stock.

On November 16, 1984, Yukon Energy Corporation filed its prospectus and registration statement for a public offering of its common stock with the Securities and Exchange Commission. A similar filing was made with the Minnesota Department of Commerce. The prospectus and registration statements stated the terms and conditions of the technology agreement between Yukon and Hagerman. In fact, the technology agreement was attached to the registration statements as an exhibit in the appendix.

The registration statements stated that Yukon had repurchased the technology from Hagerman. The statements also affirmed the fact that William Hagerman had exercised his option to purchase Yukon stock, calculated the number of shares subject to the option, declared the price per share, and promised to transfer the stock to William Hagerman.

Petitioner described the technology agreement with Hagerman on page 10 of the Yukon Energy Corporation prospectus. The passage is worth quoting in its entirety:

> Technology employed in the production of the oil and gas models of the Ultima-Ex 95 TM was purchased in November of the 1983 from the Wayne Home Equipment Division of the Scott & Fetzer Company ("Wayne Home"). The company financed the purchase of such technology through the assignment of all of its interest in the technology to an unrelated individual [William Hagerman] in exchange for $150,000. In conjunction with such assignment, the company received an irrevocable, exclusive 10-year license for the use of the technology and a concurrent 10-year option to repurchase the technology for $175,000 and granted to such individual an option to purchase a number of shares equal to five percent of the number of shares of Common Stock of the Company held by David C. Tjosvold immediately prior to any public offering of the Common Stock of the Company, exercisable at the book value of the company at the time of the exercise. In October, 1984, the Company exercised its option to repurchase the technology and the individual notified the Company of his intent to exercise his purchase option. Accordingly, the Company will issue up to 164,021 shares of its Common Stock to such individual at approximately $.23 per share upon receipt of payment therefor.

(See Prospectus, page 10, Appellant's Appendix to Appeal to the United States Court of Appeals for the Eighth Circuit, p. 63.) Similar passages describing the technology agreement and the effect of William Hagerman's exercise of his stock option were printed in other parts of the same prospectus.

On February 4, 1985, Yukon Energy Corporation filed its final registration statement with the Securities and Ex-

change Commission and the Minnesota Department of Commerce. All of the statements describing the agreement with William Hagerman and promising performance of the stock option were repeated in this amended set of documents without change. On February 14, 1985, Yukon began circulating its prospectus for the public offering of common stock. Despite the numerous acknowledgements of the existence of William Hagerman's contract and repeated statements promising performance contained in the prospectus filed with the SEC and the Minnesota Department of Commerce and circulated to the general public, Yukon Energy conducted a successful public offering of common stock without honoring the Hagerman stock option.

By August, 1985, Yukon had been conducting its public offering of common stock for nearly six months. It became clear that Yukon Energy Corporation had no intention of honoring Mr. Hagerman's stock option agreement. On August 1, 1985, Mr. Hagerman commenced an action in the United States District Court to enforce his rights.

In the ensuing months, William Hagerman conducted his discovery. Hagerman's motion for summary judgment was heard before Judge James M. Rosenbaum on April 14, 1986.

B. The District Court's Summary Judgment.

The motion for summary judgment was primarily based on the substantial admissions made by Yukon in its Answer to the Complaint, the admissions in Yukon's documents filed in connection with its public offering of stock, and its conduct subsequent to William Hagerman's exercise of the stock option.

Yukon opposed the motion, submitting briefs in opposi-

tion on the merits. Yukon made no request for a stay of consideration of the motion to conduct additional discovery or to otherwise develop facts in support of its defense to the summary judgment motion.

In defense against Hagerman's motion for summary judgment, Yukon asserted that the technology agreement had been modified so that Yukon Energy Corporation was no longer obligated to honor the stock option. The only evidence brought forth by Yukon Energy Corporation in opposition to Hagerman's motion for summary judgment was the verbal assertions of David Tjosvold, Yukon Energy Corporation's president, made subsequent to commencement of suit against Yukon Energy Corporation by Hagerman. Yukon Energy Corporation offered no other evidence in support of its pleadings.

After hearing the arguments on Hagerman's motion for summary judgment, the district judge indicated his intent to make a ruling on the issue of liability. The court expressed some difficulty in determining what relief should be granted in the event liability were established by the motion for summary judgment. The court requested a conference with the attorneys to discuss appropriate relief, if any was to be awarded, and the possibility of stipulating to the relief to be awarded.

When the attorneys for the parties could not agree on the damages issue, the court ordered the parties to prepare additional briefs on the issue of damages. Both parties submitted briefs to the district court on the appropriate measure and calculation of damages to be awarded to William Hagerman in the event the court found Yukon Energy Corporation responsible for breach of its agreement with Hagerman. The memorandum regarding damages submitted

by Yukon made no objection to an award of monetary damages in lieu of specific performance or other relief. In fact, Yukon argued its own theory of calculation of damages. Petitioner failed to request a stay or any other relief necessary to develop facts or evidence in support of its opposition to the motion for summary judgment.

The district court considered the memoranda and evidence submitted by the parties on liability and the separate memoranda submitted by the parties regarding the proper measure of damages. The district court ruled that William Hagerman was entitled to judgment as a matter of law. The judgment was based on the substantial admissions made by Yukon in its Answer to the Complaint, Yukon's admission in the documents filed in connection with its public offering of common stock, and its conduct subsequent to William Hagerman's exercise of his stock option. The district court entered judgment in favor of William Hagerman by applying the measure of damages proposed by Yukon in its memorandum of damages to the stock prices and volumes contained in Yukon's documents filed in connection with its public offering of common stock.

C. The District Court's Reconsideration of Judgment.

After the district court directed that judgment be entered in favor of Hagerman, Yukon brought a motion under Rule 59 of the Federal Rules of Civil Procedure requesting the court to reconsider its entry of judgment. For the first time in the entire proceeding, Yukon claimed that the issue of damages was not one properly resolved by summary judgment. Yukon submitted additional affidavits to the court attempting to demonstrate the existence of a genuine issue of material fact. Yukon argued that judgment, if any,

should be rendered for specific performance. Yukon also attempted to argue that the new affidavits submitted to the district court raised genuine issues of material fact as to liability. The district court denied Yukon's motions without opinion.

D. The Decision of the Eighth Circuit Court of Appeals.

On appeal, the Eighth Circuit Court of Appeals re-examined all the evidence submitted to the district court. The court ruled that the admissions made by Yukon Energy Corporation in its prospectus and registration statement for the public offering of its common stock were not conclusive admissions. However, the court also found that petitioner had failed to set forth specific facts showing that there existed a genuine issue of material fact for trial. Accordingly, the Eighth Circuit Court of Appeals affirmed the district court's decision.

On Petition for Writ of Certiorari to the Supreme Court of the United States, petitioner again requests that the Court review the evidence submitted and reviewed by the district court and court of appeals and determine whether or not Yukon raised a genuine issue of material fact.

REASONS FOR DENYING THE WRIT

A.

The Decision of the Eighth Circuit Court of Appeals is in Accord With This Court's Decisions.

In its Petition for Writ of Certiorari, Yukon Energy asserts that the decision of the Eighth Circuit Court of Appeals is not in accord with this court's decision in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). However,

the question addressed by this court in that case does not bear directly on the outcome of the case at bar. Moreover, to the extent that *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), does apply, the Eighth Circuit Court of Appeals has rendered its decision in accord with that case.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) was a defamation case. The district court had granted summary judgment to petitioners on the ground that respondents were limited purpose public figures and that the "convincing clarity" standard of *New York Times Company v. Sullivan*, 376 U.S. 254 (1964) was met by respondents. The district court held that a reporter's thorough investigation and research and his reliance on numerous sources precluded a finding of actual malice. Thus, the district court granted the motion and entered judgment in favor of the petitioners.

The Court of Appeals reversed the judgment of the district court on 9 of the 21 defamatory statements pleaded in the Complaint. The Court of Appeals held that, for purposes of summary judgment, the requirement that actual malice be proved by clear and convincing evidence rather than by a preponderance of the evidence, was irrelevant. To defeat summary judgment, the respondents (plaintiffs) did not have to show that a jury could find actual malice with "convincing clarity". The court based its conclusion on its perception that to impose a greater evidentiary burden at summary judgment "would change the threshold summary judgment inquiry from a search for a minimum fact supporting plaintiff's case to an evaluation of the weight of those facts and '[it would seem] of the weight of at least the defendant's uncontroverted facts as well." 241 U.S. App.

D.C. at 253, 746 F.2d at 1570, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

This Court's inquiry focused on whether the court of appeals erred in holding that the heightened evidentiary requirements that apply to proof of actual malice in defamation cases need not be considered for the purposes of a motion for summary judgment. That specific question has no relevance to the case at bar. The questions presented in the case at bar are those of an ordinary civil case, not requiring the application of different standards of proof. As a consequence, the holding of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), has limited application to the case at bar.

This Court examined the role of the judge in deciding motions of summary judgment in *obiter dictum*. This Court said:

> Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment 'shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly submitted motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.

Id. at 247-248.

This Court went on to observe that "at the summary judgment stage the judge's function is not himself to weigh the evidence to determine the truth of the matter but to

determine whether there is a genuine issue for trial" and that this focus is suggested in Rule 56 itself. *Ibid.* The Court stated: "The inquiry performed is the threshold inquiry of determining whether there is a need for trial—whether, in other words, there are any genuine factual issues that can properly be resolved only by a finder of fact because they may be reasonably resolved in favor of either party." *Id.* at 250.

In dealing specifically with how a judge is to make the determination of summary judgment, the Court stated at page 252:

> [W]e are convinced that the inquiry involved in a ruling on a motion for summary judgment or for directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at trial on the merits. If the defendant in a run-of-the-mill civil case moves for summary judgment or for directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other, but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict — 'whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed. *Id.* at 252.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

The petitioner, having pleaded the affirmative defense of accord and satisfaction, had the trial burden to prove by a preponderance of the evidence that the parties reached such an accord and satisfaction. *Cf. Central Soya Co., Inc. v. Epstein Fisheries, Inc.*, 676 F.2d 939 (8th Cir. 1982). Hagerman produced the necessary evidence on his motion for summary judgment to demonstrate that petitioner could not meet this burden of proof.

The "onus of proof" that Yukon's affirmative defenses were based in fact fell on petitioner. The only evidence presented by the petitioner in support of its claim of an accord and satisfaction were the statements of its president, David Tjosvold, made after suit had been commenced. That scanty evidence was equivocal and contradictory, at best, constituting nothing more than a reiteration of the pleadings. Yukon presented no "specific facts" supporting petitioner's assertion of the existence of an issue of material fact. The Eighth Circuit Court of Appeals properly observed that Yukon presented no other evidence of conduct on its own part or by Hagerman (or any other evidence) which indicated that the parties reached a mutual agreement to terminate the written stock option. The Eighth Circuit Court of Appeals, by way of example, illustrated circumstances which would have precluded entry of summary judgment had such circumstances existed.

The Eighth Circuit Court of Appeals properly applied the standards for summary judgment set forth by this Court in its previous decisions. The Court determined that petitioner failed to meet its burden of production of evidence demonstrating the existence of a genuine issue of material

fact. The petitioner could not have sustained its burden of proof. This Court should not disturb the consistent decisions of the lower courts by considering the matter on Writ of Certiorari.

B.

The Issue Presented by Petitioner is Unique, Unlikely to Recur, and is Too Narrow to Warrant Review by This Court on Certiorari.

This case is truly unique. The petitioner essentially admitted the allegations of respondent's Complaint in its prospectus and registration statements for its public offering of common stock. The stock offering documents detailed the terms of the agreement with Hagerman, affirmed the fact that Hagerman had exercised the stock option, calculated the number of shares subject to the option, declared the price per share to Hagerman, and promised to transfer the stock to Hagerman. It is highly unusual that any party would make such detailed admissions in a document subject to the severe criminal and civil penalties of federal and state securities laws.

The circumstances presented by petitioner are unlikely to recur. The issue presented by petitioner is too narrow and specific to these anomalous circumstances to warrant review by this Court on certiorari. It can arise only in those cases where defendant has admitted the specific allegations of plaintiff's complaint in a liability document and failed to present any evidence to the court demonstrating its asserted defenses are anything more than verbal, unsupported denials of liability. This case has no broad impact on the use of summary judgment because the basis of the judgment in the lower courts is that petitioner failed to demonstrate

the existence, in these specific circumstances, of a genuine issue of a material fact for trial.

The district court reviewed the prospectus and stock option documents of Yukon Energy Corporation, the documentary evidence submitted by William Hagerman, the conduct of the parties subsequent to Hagerman's exercise of the stock option, and Yukon's verbal denials of liability. The district court entered judgment for William Hagerman, holding that Yukon Energy Corporation failed to raise a genuine issue of material fact in these specific circumstances. The district court reconsidered the entire record and considered additional evidence submitted by petitioner on the motion to reconsider judgment, and reaffirmed entry of summary judgment. The Eighth Circuit Court of Appeals considered the entire record on appeal and applied the same standard that the district court was to have applied in reviewing the district court's grant of summary judgment. *Hagerman v. Yukon Energy Corporation,* Petitioner's Appendix A-3. The court of appeals also found that petitioner failed to raise a genuine issue of material fact.

In essence, petitioner asks this Court to make another review of the evidence it presented to the district court. One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corporation v. Catrett,* 477 U.S. 317, 324 (1986). Neither the district court nor the Eighth Circuit Court of Appeals could find that petitioner met its burden of producing evidence of a triable issue in the specific circumstances of this case.

This Court has ruled that such a review of the evidence is not a task to be served by a grant of certiorari: "We do not grant a certiorari to review evidence and discuss

specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925). The lower courts have consistently held that petitioner failed its burden to demonstrate the existence of a genuine issue of material fact. Petitioner only seeks this Court to, once again, review its evidence.

C.

Judgment Was Properly Rendered by the District Court and Affirmed by the Eighth Circuit Court of Appeals.

The rules of civil procedure governing the entry of summary judgment provide that:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Federal Rule of Civil Procedure 56(e) (1988).

In *Matsushita Electrical Industrial Company v. Zenith Radio*, 475 U.S. 574 (1986), this Court discussed the burden of production imposed upon the nonmoving party by this rule. This Court said:

> When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. In the language of the Rule, the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial.' [The] purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial'.

Matsushita Electrical Industrial Company v. Zenith Radio, 475 U.S. 574 (1986) at 586. Defendant failed that threshold burden. That is, the record taken as a whole failed to demonstrate an existence of a genuine issue for trial.

Courts do not hesitate to grant summary judgment where a non-moving party's conduct clearly establishes an obligation. Mere verbal denials of liability do not satisfy the defendant's obligation to raise a genuine issue of material fact to overcome plaintiff's motion for summary judgment. *Yaritz v. Dahl*, 367 N.W.2d 616 (Minn. App. 1985); *Trnka v. Elanco Products Company, a Division of Eli Lilly*, 709 F.2d 1223 (8th Cir. 1983); *Murphy v. Country House, Inc.*, 307 Minn. 344, 240 N.W.2d 507 (1976). The foregoing cases demonstrate that where a contract establishes an obligation, a party's mere allegation of oral modification is insufficient to raise an issue of fact to prevent entry of summary judgment. Here, Yukon's allegation of accord and satisfaction is inconsistent with every statement and action subsequently made by the corporation, save the breach of the agreement with William Hagerman.

The evidence presented by William Hagerman established the terms and conditions of the technology agreement between Hagerman and Yukon. The evidence submitted by Hagerman also established that Yukon's claim that the contract had been modified was a sham defense. This showing by Hagerman placed the legal burden on Yukon to produce evidence from which the court could conclude that a genuine issue of fact existed as to whether or not the parties had reached an accord and satisfaction. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Petitioner has admitted all of the material allegations of Hagerman's Complaint in the registration documents

filed with the Securities and Exchange Commission and the Minnesota Department of Commerce for the public offering of Yukon Energy Corporation common stock. The technology agreement which was the foundation for the district court's entry of summary judgment in favor of Hagerman was attached as an exhibit to the registration statement filed in connection with the public offering of common stock. The prospectus itself is replete with references to the outstanding option held by William Hagerman without any qualification whatsoever. The prospectus also established the book value of the stock and the initial selling price. The petitioner's admissions left no question of material fact for trial. The district court was required only to apply the law to the facts submitted by petitioner.

The petitioner has consistently attempted to minimize the importance of the statements in its prospectus. The courts are not unmindful of the time and effort expended by the parties involved in the creation of a registration statement. The courts have examined and acknowledged the depth of involvement in conducting "due diligence" investigation in the preparation of a registration statement and the accompanyng prospectus for public stock offering. See, e.g., *Escott v. Bar Chris Construction Corporation*, 280 F.Supp. 643, 682 (S.D. N.Y. 1968); *Feit v. Leasco Data Processing Equipment Corporation*, 332 F.Supp. 544, 575 (E.D. N.Y. 1971).

The motivation to accomplish such far reaching, detailed study of the liability owing to Hagerman by petitioner is supplied by the substantial criminal and civil penalties imposed by the Securities Act of 1933, the Securities Exchange Act of 1934, and the Minnesota Securities Act. The overwhelming evidence of Yukon's own admissions clearly estab-

lished that Hagerman was entitled to judgment as a matter of law and squarely placed the burden to raise issues of material fact on the petitioner.

Petitioner attempted to raise an issue for trial by asserting that the technology agreement was modified. However, the prospectus and stock offering registration documents deny the existence of the alleged accord and satisfaction. More importantly, the statements on which petitioner relies to raise its defense were statements made subsequent to commencement of suit by Hagerman. The evidence presented by petitioner was nothing more than a reiteration of its pleadings. The Eighth Circuit Court of Appeals properly pointed out that petitioner failed to provide evidence of specific facts supporting its asserted affirmative defense of accord and satisfaction. (See *Hagerman v. Yukon Energy Corporation*, 839 F.2d 407 (1988), page A-7 of petitioner's Appendix).

In its Petition for Writ of Certiorari, petitioner argued that Hagerman agreed to privately underwrite an initial public offering of Yukon Energy Corporation stock. The first time this defense was raised by petitioner was in its appeal to the Eighth Circuit Court of Appeals. Petitioner had failed to raise this issue before the district court on Hagerman's motion for summary judgment. Petitioner also failed to raise this defense in its motion for reconsideration before the district court. These allegations should not be permitted as a defense at this time.

Petitioner's assertion of this defense is a transparent attempt to create a fact issue out of whole cloth. The only evidence offered by the defendant to support this claim is a combination of an uncertain statement by David Tjosvold, the president of the corporation, and the cover page of

Yukon's prospectus which notes the total number of shares offered to the public. This information does not give rise to a genuine issue of material fact. Again, if Yukon contested the nonperformance by Hagerman or the satisfaction of a condition precedent, it had the opportunity to state its position in the prospectus. The prospectus failed to mention any nonperformance on the part of Hagerman or the non-satisfaction of any condition precedent on the part of Hagerman.

Moreover, even accepting all of the inferences so liberally asserted by the petitioner in its Petition for Writ of Certiorari regarding the claim that Hagerman agreed to privately underwrite two million shares of a five million share stock offering, the conclusion does not serve to deny Hagerman summary judgment. The most liberal construction of these circumstances would be to conclude the existence of a unilateral contract offer by Hagerman to underwrite two million shares in the event Yukon Energy Corporation commenced a public offering of five million shares of stock. No such offering was made. Petitioner never made a claim for the underwriting. The Eighth Circuit Court of Appeals has recognized the lack of evidence supporting petitioner's allegations. This defense has no basis in fact and was properly rejected when heard the first time before the Eighth Circuit Court of Appeals.

In its Petition for Writ of Certiorari, the petitioner attempts to raise questions regarding the district court's determination of Hagerman's legal remedy. The decision of the district court and the affirmation by the court of appeals were in accordance with applicable law.

The legal construction of contracts is a matter for the court unless its terms are found to be unclear or ambiguous.

See, e.g. *Barnes v. Northwest Airlines,* 233 Minn. 410, 47 N.W.2d 180 (1951). The district court determined that the technology agreement unambiguously required Yukon to honor Hagerman's stock option upon the commencement of a successful public stock offering. Yukon completed the stock offering without having honored Hagerman's stock option. The court properly determined that the date of the breach of the technology agreement was the date of the public stock offering as a matter of law.

Similarly, the determination of Hagerman's option price was a matter of law. The court needed only to mechanically apply the unambiguous terms of the contract to the calculations made by the petitioner in its stock prospectus. Petitioner failed to bring to the court specific facts which would raise a genuine issue as to the propriety of these calculations. The court considered all the evidence presented by the parties. The court's determination was proper.

Petitioner argues that the fair market price of the stock on the date of the breach should have been discounted on the ground that Hagerman's stock was to be unregistered stock. The Eighth Circuit Court of Appeals properly observed that the petitioner did not claim the stock to be unregistered until after the court had entered judgment against it. More importantly, at the summary judgment motion hearing for the district court, counsel for the petitioner advised the court that the stock was not to be "lettered". The stock was to be freely transferable.

Finally, Yukon acceded to the district court's determination of damages. At the hearing during which the initial motions and crossmotions for summary judgment were heard by the district court, the parties primarily argued concepts of liability based upon the memoranda which had

been filed as of that date. Following oral argument, Judge Rosenbaum requested that the parties discuss the possible resolution of the issue of determination of the legal remedy. When the parties could not reach an agreement on how the court should determine its remedy, the district court required the parties to submit briefs arguing the issue of remedies.

The parties responded with appropriate memoranda on the issue of damages. The petitioner made no claim in its memorandum on damages that the procedure adopted by the court was inappropriate. In fact, the petitioner's memorandum states as follows:

> For the reasons set forth below, defendants respectfully submit that monetary damages, if any, should be determined in accordance with the principles set forth herein and in the attached affidavits, that any award of attorney's fees is unwarranted and unsupported, and that a determination as to costs must await the submission of proposed costs by the plaintiff.

(See Defendant's Memorandum of Law on Damages, Appendix to Appellant's Brief to the Eighth Circuit Court of Appeals, page 152).

In its memorandum on damages, petitioner proposed the following measure of damages:

> Thus, the appropriate maximum monetary damages which are awardable in the present circumstances should be determined by subtracting the book value per share from the fair market value per share at the time of the breach and multiply the resulting amount of the number of shares subject to the option.

(Defendant's Memorandum of Law on Damages, Appendix to Appellant's Brief to the Eighth Circuit Court of Appeals, page 152).

It is clear that the defendant believed damages were to be determined by the district court and participated willingly in this process. It is equally evident that the petitioner did not believe that a fact issue existed when the court requested that the parties submit briefs on damages. By its own statements, through previous counsel, the petitioner established, and agreed with plaintiff, that no fact issues remained on the issue of damages.

The record before the district court when it granted Hagerman's summary judgment supported the court's findings. The augmented record submitted by the petitioner on its motion for reconsideration before the district court also failed to raise any factual issues. The Eighth Circuit Court of Appeals, using the same standard of review as the district court, was equally unimpressed with the petitioner's speculative arguments. This Court need not consider issues not properly raised before the district court. More importantly, this Court need not consider the issues properly decided in the courts below. The Petition for Writ of Certiorari should be denied.

CONCLUSION

The district court found that William Hagerman demonstrated that he was entitled to judgment as a matter of law and that petitioner failed to raise a genuine issue of material fact which would preclude entry of judgment. The Eighth Circuit Court of Appeals, using the same standard of review used by the district court, affirmed the decision of the district court. Petitioner has raised only questions turning entirely on the facts of this case, already resolved twice in favor of respondent, and without any impact outside the limits of this case. There is no compelling, special or important reason for the Court to exercise its discretion to review this matter. The Court should deny the Petition for Certiorari.

Respectfully submitted,

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